No. 18,240

IN THE

United States Court of Appeals

For the Ninth Circuit

JANE G. WEST and RALPH E. WEST,
Appellants,

vs.

RUTH SHIZUKO TAN, individually and doing business as BANYAN INN,
Appellee.

APPELLANTS' CLOSING BRIEF

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Come now appellants Jane G. West and Ralph E. West, her husband, and present herewith their closing brief in the above appeal, which said brief constitutes a reply to the brief on behalf of appellee.

I.

INTRODUCTION

Appellee's brief is, in our opinion, an excellent trial brief. It very carefully marshals every bit of evidence favorable to appellee (defendant), and, with equal care, searches for and sets forth all possible legal citations supporting defendant's theory of the case, namely, that defendant was not guilty of negligence and that plaintiff was guilty of contributory negligence and that plaintiff exceeded the bounds of invitation. Appellee's brief does indeed very ably

argue the facts and the law favoring defendant's theory of the case.

But such dissertations have nothing whatever to do with this appeal.

This appeal is founded upon the premise that the trier of fact, namely, the jury, has *determined* that defendant was negligent, that plaintiff was not guilty of contributory negligence, nor did plaintiff exceed the bounds of her invitation. Appellee blithely ignores this determination and proceeds to set forth evidence and argument to convince this Court to the contrary!

As set forth in our opening brief, the question on this appeal begins and ends with the following: Where is the substantial evidence to support the jury's determination?

The cases supporting this obvious rule of law respecting the issue in this Court as distinguished from the issue in the trial court appear at page 5 of our opening brief, including four cases from this Court. It is significant that *not one* of these cases is mentioned in appellee's brief.

The evidence supporting the jury's determination is set forth at pages 6 to 11 of our opening brief, with detailed references to the transcript. It is most significant that appellee's brief *totally ignores* this mass of detailed evidence, and sets forth her own version of the "facts."

The failure of appellee to question one single statement of fact in appellants' opening brief is the best

possible indication of the correctness of that recitation. Otherwise, appellee would surely have challenged at least some of appellants' account.

Further, appellee's failure to even attempt to meet appellants' assertion of error by the trial court makes it crystal clear that the error did, in fact, occur. For this reason alone, the judgment entered by the trial court contrary to the verdict of the jury cannot stand.

II.

THE FACTS

Appellants' opening brief (pages 6-11) clearly and specifically sets forth the evidence that was before the jury supporting plaintiffs' case, and upon which the verdict of the jury rests. Each statement of fact is painstakingly cited to the transcript.[1]

As has already been noted, not one of these statements is challenged by appellee. Appellee's brief, rather, sets forth her own version of the "facts" and the evidence favorable to her. We do not propose to be drawn into an extended discussion of whatever evidence there was favorable to appellee, for, clearly, the same is not pertinent to this appeal. However, we cannot ignore several of the inadvertent inaccu-

[1]Appellee's brief (page 2) contends that appellants failed to comply with this Court's rule requiring citation to the record. Apparently, appellee's references to the record are to the page numbers appearing in red pencil at the lower right-hand corner of the transcript. Appellants' references are to the typewritten paginations appearing in the upper right-hand corner of the transcript. Appellants' copy of the transcript does not have any numbers in the lower right-hand corner of the page.

racies appearing in appellee's "Statement of the Case":

1. Appellee states the platform from which appellant fell was "8 inches higher than the dance floor." (Appellee's Brief, page 3.) At the place in the record cited by appellee the following appears:

> "Q. Did you hear your attorney state that the bandstand stood up approximately a foot above the dance floor?
>
> A. The top of the platform of the bandstand was about a foot above the dance floor. That is what he said—approximately.
>
> Q. Is that your best estimate?
>
> A. That is my best estimate too.
>
> Q. Could it be 8 inches?
>
> A. No, it is too short."

2. Appellee's brief (page 3) states that "It is undisputed that the bandstand and piano were solely for the use of musicians who played at the restaurant and not for the patrons." The record does not support this statement, for defendant herself admitted that people other than the musicians played the piano. (Rep. Tr. p. 470, lines 20-24.)

As has already been shown in detail in appellants' opening brief (pages 7-9), defendant's waitress, when it was suggested that Mrs. West play the piano, "acted like the place needed some entertainment and she was glad to have it take place" (Rep. Tr. pp. 77, 158), and acted "very pleased." (Rep. Tr. p. 216.) Defendant herself was fully aware of the fact that Mrs. West was playing the piano and did nothing to stop her. (Rep. Tr. p. 455.) Other guests at the

restaurant heard and enjoyed the piano playing. (Rep. Tr. pp. 28, 79, 399.) One waitress testified that she did not remember the defendant *ever* saying anything to the waitresses to the effect that they should stop people from playing the piano. (Rep. Tr. p. 489.) Defendant's husband was present at the restaurant all that evening (Rep. Tr. p. 464), but did nothing to stop Mrs. West from playing the piano. (Rep. Tr. p. 475.)

3. Appellee's brief states (page 3) that "appellee always had a sign on the piano fastened with Scotch tape, 'Do not play piano.' " The record, once again, fails to support this statement, for at the very point in the transcript cited by appellee, appellee herself testified that she "couldn't remember whether or not it was up that night." Defendant's waitress could not remember that such a sign was on the piano on the night in question. (Rep. Tr. p. 489, lines 14-19.) No witness testified that there was any such sign on the piano on the night in question. Plaintiff Mrs. West flatly denied that there was any such sign. (Rep. Tr. p. 23, lines 3-9.) Another witness, Mrs. Lyons, also flatly denied that there was any such sign. (Rep. Tr. p. 167, lines 20-25.)

4. With unsubtle innuendo, appellee's brief states (page 4):

> "Mr. Apo, a county liquor inspector, saw Appellant who appeared as though she had been having some drink."

Appellee fails to note that this witness, who was an old friend of defendant for some 24 years (Rep. Tr. p. 396), also testified:

"I didn't say that I couldn't state that she wasn't intoxicated, because if she was intoxicated I could have stated it. But I stated she had been drinking, but she wasn't intoxicated."

(Rep. Tr. p. 441, lines 14-17.)

The foregoing constitutes but a sampling of the inadvertent inaccuracies appearing in appellee's version of the facts. However, as we have already stated, we do not undertake in this brief to refute all of appellee's factual assertions for the simple reason that *whatever* evidence there was in the trial court favoring defendant, the same was, by necessary implication, rejected by the factual determination of the jury in favor of plaintiff.

Since appellee has chosen to ignore the facts which support that determination of the jury, it is respectfully submitted that the action of the trial court in setting aside that determination of the jury must be reversed on this appeal.

III.

THE LAW

Since appellee has chosen to rely upon those facts which support her theory of the case, it is obvious that the law cited by appellee with reference to those facts is equally inappropriate on this appeal.

We are not concerned here with general rules of law pertaining to negligence or contributory negligence, scope of invitation, or assumption of risk. We

are concerned with that rule of law which declares that these matters *are for the determination of the jury.* The cases so holding, including a number from this Court, are set out at pages 12 to 17 of appellants' opening brief—some 21 or more specific citations. Of these, but three are even mentioned in appellee's brief! It is clearly apparent that appellee *cannot* controvert this basic rule of law, that questions of negligence and scope of invitation are essentially *fact* questions to be determined by the jury.

The three cases cited by appellant which are mentioned by appellee are:

1. *Chance v. Lawry's, Inc.*, 24 Cal. Rep. 209, 374 P. 2d 185.

Appellee attempts to distinguish this most pertinent citation with the remark that in the *Chance* case, plaintiff was injured "as a result of the hazardous condition of the premises in the very area provided for guests." (Page 13.) However, appellants cited the *Chance* case because of the clear statement of law, that it is for the jury to determine whether defendant was negligent, even though the danger was obvious. The Court there said:

> "There are many cases involving accidents in mercantile establishments where the question of plaintiff's contributory negligence has been held to be a question for the jury even though the plaintiff failed to observe what may have been an obvious danger."

2. The second of appellants' cases mentioned in appellee's brief is *King v. Yancey*, 147 Fed. 2d 379.

Appellee quotes certain dicta in that case, but ignores the ruling of this Court in that case, which reversed judgment entered by the trial court for defendant with instructions to the trial court that it was a question of fact for the jury to determine whether plaintiff was an invitee or licensee!

3. The third and last of appellants' cases noted by appellee, out of all of the host of cases cited by appellants on this controlling point, is that of *Swift & Co. v. Schuster*, 192 Fed. 2d 615. Appellee argues (page 12) that Professor Seavey has criticized this decision!

The remaining legal authorities cited in appellee's brief, as we have already noted, pertain to general rules of law on the subjects of negligence, contributory negligence, scope of invitation, and assumption of risk. While interesting, these authorities have nothing to do with this appeal, for it is the unquestioned rule of law that these matters are for the determination of the jury. Since we have shown the mass of evidence that *does* support the verdict of the jury in this case, it necessarily follows that that verdict must stand, and that the action of the trial court in setting aside the said verdict should be reversed on this appeal.

Dated, San Francisco, California,
February 13, 1963.

Respectfully submitted,
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